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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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10 Ta Yoat Ni,

11 Petitioner,

12 vs.

13 Charles L. Ryan, et al.,

14 Respondents.
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No. CV-13-01155-PHX-PGR (FJM)

ORDER

16 Having reviewed *de novo* the Report and Recommendation on Petition for Writ
17 of Habeas Corpus of Magistrate Judge Metcalf in light of the petitioner's timely filed
18 Objection to Magistrate's Report and Recommendation to Habeas Corpus Petition
19 (Doc. 15), the Court finds that the petitioner's habeas corpus petition, filed pursuant
20 to 28 U.S.C. § 2254, should be dismissed with prejudice as time-barred because it
21 was filed several years after the expiration of the AEDPA's one-year statute of
22 limitations.¹

23 The Court concludes that the limitations period was statutorily tolled only
24 through August 7, 2007, the date the state trial court denied the petitioner's Post-
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Because the habeas petition was not timely filed, the Court cannot resolve the merits of the petition.

1 Conviction Relief ("PCR") petition, giving the petitioner until August 30, 2008 in which
2 to file a timely § 2254 petition. His pending petition was not filed, however, until
3 June 7, 2013 (or June 5, 2013, at the earliest, using the mail-box rule).

4 The Court rejects the petitioner's argument in his Objection that his habeas
5 petition is timely because he is entitled to have the time period between August 7,
6 2007 and August 21, 2012 statutorily tolled on the ground that his PCR petition was
7 pending before the state trial court for that entire period. The petitioner's argument
8 is based on his contention that he did not receive a copy of the 2007 denial of his
9 PCR petition until December 8, 2010, that he then filed on January 3, 2011 a Motion
10 of Notice of Reconsideration Re: From the Denial of Petition for Post-Conviction
11 Relief, and an Extension of 30 Days in Which to File [a motion for reconsideration],
12 followed by a substantive Motion for Reconsideration filed on January 20, 2011, and
13 that the state trial court did not deny his Motion of Notice for Reconsideration until
14 August 21, 2012.² The Court agrees with the Magistrate Judge that this time period
15 cannot be tolled as a continuation of the PCR petition because the state trial court
16 denied the Motion of Notice of Reconsideration as untimely, without ever reaching
17 the merits of the petitioner's subsequent Motion for Reconsideration.

18 The Court further agrees with the Magistrate Judge that the petitioner has not
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21 The petitioner did not appeal the state trial court's denial of his PCR
22 petition or its denial of his Motion of Notice for Reconsideration, nor did he fairly
23 present any of his federal habeas claims to the state courts, and he is now
24 procedurally precluded under Arizona law from doing so. Thus, even if the habeas
25 petition could be found to have been timely filed, the Court would still have to
26 dismiss it without reaching its merits because the petitioner procedurally defaulted
on all of his federal claims raised in his habeas petition and has not shown either the
required cause and prejudice for his default or a fundamental miscarriage of justice
sufficient to excuse his default. Furthermore, he makes no claim of actual
innocence.

1 established that he is entitled to any equitable tolling. Even if the Court accepts the
2 plaintiff's contention that he did not receive notice of the 2007 denial of his PCR
3 petition until sometime in December, 2010, he has not demonstrated that he is
4 entitled to the equitable tolling necessary to make his habeas petition timely. What
5 the petitioner has not shown is any casual connection between the delayed notice
6 of his PCR denial and any inability on his part to timely file a habeas petition given
7 that he could have timely filed a protective habeas petition and then asked to have
8 it stayed pending his inquiry into the status of his PCR petition and his belated
9 attempt to exhaust his state remedies, as noted by the Supreme Court in Pace v.
10 DiGuglielmo, 544 U.S. 408, 416 (2005). Therefore,


11 IT IS ORDERED that the Magistrate Judge's Report and Recommendation on
12 Petition for Writ of Habeas Corpus (Doc. 12) is accepted and adopted by the Court.

13 IT IS FURTHER ORDERED that the petitioner's Petition Under 28 U.S.C. §
14 2254 for a Writ of Habeas Corpus by a Person in State Custody is denied as time-
15 barred and that this action is dismissed with prejudice.

16 IT IS FURTHER ORDERED that no certificate of appealability shall issue and
17 that the petitioner is denied leave to appeal *in forma pauperis* because jurists of
18 reason would neither find it debatable whether the petitioner has made a substantial
19 showing of the denial of a constitutional right nor whether the Court is correct in its
20 procedural ruling.

21 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment
22 accordingly.

23 DATED this 9th day of June, 2014.

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26 Paul G. Rosenblatt
United States District Judge